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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CHRISTIAN RIVINIUS, Plaintiff and Respondent, v. GABRIEL QUINNAN and JON VONDER HAAR, Defendants and Appellants.	A150024 (Sonoma County Super. Ct. No. SCV256275)

In what has become essentially an action to collect on a criminal restitution order, plaintiff Christian Rivinius alleges a single cause of action under the Uniform Fraudulent Transfer Act (UFTA) (Civ. Code, §§ 3439 et seq.)[1] against, among others, Franklin Lee, the man who molested plaintiff, and two of Lee's attorneys. Plaintiff alleges that Lee's attorneys participated in a fraudulent transfer of Lee's assets in order to prevent plaintiff from collecting restitution. This appeal by the attorneys, Gabriel Quinnan and Jon Vonder Haar, follows the trial court's order overruling their demurrer under section 1714.10 and denying their anti-SLAPP motion under Code of Civil Procedure section 425.16. We affirm.

[1] In 2015, the Uniform Fraudulent Transfer Act was renamed the Uniform Voidable Transactions Act, and its provisions apply to transactions that occur after January 2016. (Civ. Code, § 3439.14, subd. (a).) All further statutory references are to the Civil Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Franklin Lee was arrested and subsequently imprisoned for sexually molesting plaintiff as a minor.[2] While the criminal case against Lee was pending, plaintiff filed this civil suit, and Lee retained defendant Vonder Haar to represent him. Plaintiff's operative second amended complaint alleges a cause of action for violation of the UFTA against Lee, Lee's brother who held his power of attorney, Quinnan, and Vonder Haar arising from a number of monetary transfers to Quinnan and Vonder Haar. The court granted a preliminary injunction in the civil case prohibiting Lee from dissipating his assets, except to sell his residence and to pay for his basic necessities and civil defense. Lee was also indicted on federal child pornography charges, and defendant Quinnan took over Lee's representation in the state and federal criminal cases.

Plaintiff alleges that, on June 9, 2015, he gave notice to Quinnan and Vonder Haar that he intended to seek a restitution order in the state criminal case, and the same day notified Quinnan that the preliminary injunction did not allow Lee to use his assets to pay for a criminal defense. Plaintiff filed a restitution request on June 11, 2015 for $750,000. That same day, Lee applied ex parte to vacate the preliminary injunction due to plaintiff's alleged failure to post a bond or to modify the preliminary injunction to allow payment for Lee's criminal defense. Using the proposed order Lee submitted, the court set his motion to vacate or modify the preliminary injunction for hearing on shortened time but failed to cross out language in the proposed order stating the injunction was vacated. At a hearing on June 26, 2015, the court declined to modify or vacate the injunction.

Meanwhile, on June 12, 2015, Lee's brother transferred to Vonder Haar and Quinnan $50,000 each from Lee's bank account. Plaintiff claims that Quinnan and/or Vonder Haar requested these transfers upon learning of plaintiff's intent to seek restitution and that their motivation was to defraud plaintiff. Prior to these transfers, Lee had also paid Vonder Haar $20,000.

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[2] The factual allegations are taken from the second amended complaint and facts judicially noticed by the court on defendants' demurrer.

Next, days before the scheduled restitution hearing, Lee's brother transferred to both Vonder Haar and Quinnan another $50,000 each from Lee's bank account, although Quinnan returned his second transfer. Plaintiff alleged that Vonder Haar had not earned the second $50,000 and that Lee, Lee's brother, Quinnan, and Vonder Haar made and participated in the transfers with intent to hinder, delay or defraud plaintiff in an attempt to shield Lee's assets. Plaintiff further alleged that the amounts of the transfers were unreasonable for Vonder Haar's and Quinnan's services.

In September 2015, the court in the state criminal case ordered Lee to pay $750,000 in restitution. Lee reported to plaintiff that he had $5,000 in assets, which contradicted his unverified estimate of $100,000 from earlier that summer. After the court granted an order compelling Lee to respond to discovery regarding his assets, plaintiff discovered the transfers to Vonder Haar and Quinnan. Plaintiff further alleged that he later learned that Vonder Haar held money in trust for Lee, which Vonder Haar had concealed by falsely claiming in discovery responses that no assets were held in trust for Lee.

Defendants specially and generally demurred to the second amended complaint. In their special demurrer, they argued the complaint should be stricken because plaintiff failed to follow the procedures required to file a complaint alleging a civil conspiracy between attorneys and their clients under section 1714.10, subdivision (a).

Defendants also filed an anti-SLAPP motion to strike plaintiff's complaint under Code of Civil Procedure section 425.16, arguing that plaintiff's UFTA claim arose from protected activity and that plaintiff could not establish that his claim had a probability of success. With respect to Vonder Haar, this special motion to strike was filed after Code of Civil Procedure section 425.16's 60-day deadline, and the court denied his ex parte request to allow a late filing. Vonder Haar sought relief from the 60-day deadline by noticed motion, but he subsequently withdrew the motion.

The court overruled defendants' demurrer. The court also denied defendants' anti-SLAPP motion, finding that plaintiff's UFTA claim did not arise from protected activity and that plaintiff had established a probability of success. The court further ruled that

Vonder Haar was not a party to the anti-SLAPP motion because his motion was untimely, and he had been denied permission to file a late motion. Quinnan and Vonder Haar timely appealed the court's orders overruling their demurrer and denying the anti-SLAPP motion.

DISCUSSION

I. The Ruling on the Demurrer

We first consider defendants' demurrer under section 1714.10. An order overruling a demurrer is not generally appealable (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1695), but an order rendered under section 1714.10 that "determines the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed" is appealable as a final judgment. (§ 1714.10, subd. (d).) We review an order overruling defendants' demurrer under section 1714.10 de novo. (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 822 (*Berg*).)

A. The Trial Court Correctly Overruled Defendants' Demurrer

Section 1714.10, subdivision (a) (subdivision (a)), prohibits the unauthorized filing of an action against an attorney for civil conspiracy with a client arising from any attempt to contest or compromise a claim or dispute and based upon the attorney's representation of the client.[3] The plaintiff must establish a reasonable probability of

[3] Subdivision (a) states in full: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based. The court shall order service of the petition upon the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination. The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any

prevailing before such complaint is filed. (§ 1714.10, subd. (a).) To do so, the plaintiff must file a verified petition with a proposed pleading and supporting affidavits stating the facts upon which the attorney's liability is based. These documents must be served on the attorney, and the attorney may then file opposing affidavits. (*Ibid*.) If the court determines the plaintiff has met his or her burden, the plaintiff may file the complaint. (*Ibid*.)

There are two exceptions to subdivision (a)'s special procedures. Under section 1714.10, subdivision (c), the procedures do not apply to a cause of action against an attorney for civil conspiracy with a client when "(1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain."

Preliminarily, we note the parties do not dispute that the operative complaint concerns a civil conspiracy between an attorney and client. They disagree, however, about whether the exceptions in subdivision (c) apply. Although the complaint avoids use of the term "conspiracy," allegations that defendants participated in fraudulent transfers of Lee's assets with intent to defraud suggest a civil conspiracy. (See *Berg, supra*, 131 Cal.App.4th at pp. 823–824 [the substance of the allegations, not their labels, governs section 1714.10's applicability]; *Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1858–1859 [one can only become a fraudulent transferee through deliberate wrongful conduct and not by accident or even negligence].) Nonetheless, we agree with plaintiff that the allegations of the complaint establish that it is subject to the "independent legal duty" exception contained in section 1714.10, subdivision (c)(1) (subdivision (c)(1)).

Subdivision (c)(1) reflects the general rule that an agent (the attorney) is liable for his own torts and must answer for his own wrongful conduct. (*Shafer v. Berger, Kahn,*

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applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed."

Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 68–69 (*Shafer*).) " 'Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable . . . , the same activities by a lawyer in the same circumstances generally render the lawyer liable . . . .' " (*Id.* at p. 69.)

Pursuant to subdivision (c)(1), California courts have applied the foregoing rule to exempt claims of conspiracy to defraud from subdivision (a)'s requirements. In *Shafer*, the plaintiff alleged that the defendant attorney made misrepresentations and conspired with a client to commit fraud, and the court found that plaintiff's claims were exempt from subdivision (a) because attorneys have an independent legal duty not to defraud third parties. (*Shafer*, *supra*, 107 Cal.App.4th at pp. 66, 84–85.) In *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 396–397 (*Pavicich*), the court held that the plaintiff's claim against an attorney for conspiring with his clients was exempt under subdivision (c)(1) because the plaintiff alleged the attorney made express misrepresentations to plaintiff. Likewise, in *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 210–212 (*Favila*), the court held that plaintiff should have been allowed to file an amended complaint without complying with subdivision (a) to state a conspiracy claim premised on a fraudulent scheme between an attorney and client to transfer corporate assets to a third party at a grossly undervalued price.

Plaintiff asserts a UFTA claim under section 3439.04, subdivision (a)(1), pursuant to which a debtor's transfer is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the transfer was made with the actual intent to hinder, delay, or defraud any creditor. (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 (*Filip*); § 3439.04, subd. (a)(1).) Numerous non-exclusive statutory factors provide guidance in determining whether a transfer was made with the requisite fraudulent intent:

> (1) Whether the transfer or obligation was to an insider.
> (2) Whether the debtor retained possession or control of the property transferred after the transfer.
> (3) Whether the transfer or obligation was disclosed or concealed.
> (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
> (5) Whether the transfer was of substantially all the debtor's assets.

(6) Whether the debtor absconded.
(7) Whether the debtor removed or concealed assets.
(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
(11) Whether the debtor transferred the essential assets of the business to a lien[holder] who transferred the assets to an insider of the debtor.

(§ 3439.04, subd. (b); *Filip, supra*, 129 Cal.App.4th at p. 834.)

Remedies for a fraudulent transfer include avoidance of the transfer to the extent necessary to satisfy the creditor's claim. (§ 3439.07, subd. (a)(1).) Judgment may be taken against the first transferee of the asset; however, a creditor may not void a transfer under section 3439.04 subdivision (a)(1) against a transferee who "took in good faith and for a reasonably equivalent value . . . ." (§ 3439.08, subds. (a), (b)(1).) "Good faith" means that the transferee acted without actual fraudulent intent and did not collude with the debtor or otherwise actively participate in the debtor's fraudulent scheme. (*Lewis v. Superior Court, supra*, 30 Cal.App.4th at p. 1858; see also *Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33, 37 [transferee does not take in good faith if he or she had fraudulent intent, colluded with a person who was engaged in the fraudulent conveyance, actively participated in the fraudulent conveyance, or had actual knowledge of facts showing knowledge of the transferor's fraudulent intent].)

The UFTA thus establishes that a transferee has a legal duty not to knowingly participate in a fraudulent transfer. (See §§ 3439.04, subd. (a)(1), 3439.08, subd. (a); see also *Filip, supra*, 129 Cal.App.4th at p. 837 ["a claim under the UFTA in fact involves

tortious conduct"].)[4] A transferee who takes property "in good faith and for reasonably equivalent value" does not violate this duty and may prevent the voiding of the transfer. (§ 3439.08, subd. (a).) Plaintiff pleads that defendants knowingly participated in fraudulent transfers to hide Lee's assets and did not provide services comparable to the value of the assets they accepted. Plaintiff thus seeks to hold defendants liable for violation of their independent legal duties not to engage in fraudulent activity, and these allegations fall within the scope of subdivision (c)(1).

Berg, *supra*, 131 Cal.App.4th 802, relied on by defendants, is distinguishable. In *Berg*, the plaintiff creditor sought leave to file a complaint against an attorney and his client, an assignee for the benefit of creditors, alleging a conspiracy to waste corporate assets through the attorney's unnecessary legal services and excessive billing. (*Id.* at p. 809.) Plaintiff argued that it did not have to comply with subdivision (a) because both exceptions within subdivision (c) applied. The court found subdivision (c)(1) inapplicable because the plaintiff sought to enforce a fiduciary duty and an attorney has no independent fiduciary duty to third party creditors; the court also held that allegations of an attorney's excessive billing, no matter how egregious, do not satisfy subdivision (c)(2)'s " 'in furtherance of the attorney's financial gain' " requirement. (*Id.* at pp. 835–836.) As plaintiff here points out, *Berg* did not address a claim alleging violation of an attorney's duty not to engage in fraudulent conduct, and it expressly distinguished such

[4] In a statement that is itself dictum, the court in *Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, characterized as dictum *Filip*'s statement that fraudulently transferring property constitutes tortious conduct. There, appellant Renda cited *Filip* in arguing that he was entitled to recover both the amount awarded under his original judgment against respondent Navarez, as well as additional money damages against Nevarez as the debtor in his subsequent complaint under the UFTA. In rejecting Renda's argument that he was effectively entitled to double recovery, the court correctly noted that *Filip* "did not hold the plaintiff was entitled to a money judgment against the debtor for tort damages under the UFTA." (*Renda*, at p. 1240.) *Renda*'s remark limiting the type of damages available under the UFTA against a debtor in those circumstances does not, in our view, undermine *Filip*'s unremarkable observation that a claim under the UFTA alleging a transfer with actual intent to hinder, delay, or defraud creditors "in fact involves tortious conduct." (*Filip*, *supra*, 129 Cal.App.4th at p. 837.)

cases. (*Id.* at pp. 825, 828.) *Berg's* discussion of subdivision (c)(2) is further inapposite because this statutory provision does not provide the basis for our decision.

We also reject defendants' assertion that a conflict exists between plaintiff's fraudulent transfer claim and the policy underlying section 1714.10. As a threshold matter, defendants do not argue that the provisions of the UFTA conflict with the terms of section 1714.10 on their face. Rather, they argue that allowing plaintiff's claim against an attorney "would directly conflict with the *policies* behind Civil Code section 1714.10" (italics added), relying on *Berg*. But *Berg* does not support defendants' argument because, as we observed, *Berg* expressly distinguished cases involving an attorney's independent duty not to engage in fraud. (*Berg*, *supra*, 131 Cal.App.4th at pp. 825, 828.) Subdivision (c)(1) makes clear that allegations of attorney fraud fall outside of section 1714.10's special requirements. (§ 1714.10(c)(1); see also *Shafer*, *supra*, 107 Cal.App.4th at pp. 84–85; *Pavicich*, *supra*, 85 Cal.App.4th at pp. 396–397.) Accordingly, no conflict exists between the allegations here and the public policy concerns addressed in *Berg*. On the other hand, public policy would likely be violated by adoption of defendants' implicit contention that attorneys who engage in fraudulent activity with their clients are exempt from liability under section 1714.10 by virtue of their status as attorneys.

Finally, we find that plaintiff adequately alleged a cause of action under the UFTA. (See *Favila*, *supra*, 188 Cal.App.4th at pp. 211–212 [assessing whether plaintiff's pleading stated a viable fraud cause of action against an attorney after finding the pleading's allegations fell within subdivision (c)(1)].) Plaintiff pled facts establishing the transfer of Lee's assets and the following indicators of fraudulent intent: the transfers occurred after plaintiff sued and sought restitution but before the court granted restitution (§ 3439.04, subds. (b)(4), (10)); the money transferred represented a significant amount of Lee's assets (*id.*, subd. (b)(5)); the transfers were actively concealed (*id.*, subd. (b)(3)); and the amount transferred was not reasonable for the services rendered (*id.*, subd. (b)(8)).

Wyzard v. Goller (1994) 23 Cal.App.4th 1183 does not compel a contrary conclusion. Defendants correctly note that, under *Wyzard*, summary judgment may be appropriate for the defendant on a UFTA claim where uncontroverted facts establish that a client transferred money to an attorney to satisfy an antecedent debt, and no dispute exists regarding the performance or value of the services provided, regardless of whether the transfer disfavored other creditors. (*Id.* at p. 1188–1191.) However, plaintiff alleges the amounts transferred to defendants were unreasonable for the services provided, and at least one transfer was unearned. Accepting these allegations and the beneficial inferences drawn therefrom as true as we must at this stage (see *Pavicich*, *supra*, 85 Cal.App.4th at pp. 385, 389), plaintiff adequately pled a UFTA cause of action.[5]

I. The Anti-SLAPP Motion

A. Parties to the Anti-SLAPP Motion

Although defendants purport to jointly appeal the merits of court's order denying their anti-SLAPP motion, the court ruled Vonder Haar was not a party to this motion because his filing was untimely. Defendants mention this issue only in a short footnote, and we need not consider issues addressed only in footnotes. (*Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562; *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 160.) Because the court's ruling that Vonder Haar was not a party to the anti-SLAPP motion stands, we address only Quinnan's challenge on the merits.

[5] We reject defendants' argument that plaintiff cannot allege a fraudulent transfer because defendants believed the preliminary injunction had been vacated at the time of the June 2015 transfer to Quinnan. Although the trial court's order on Lee's ex parte application erroneously included contradictory language vacating the injunction, it set a hearing date and briefing schedule for Lee's motion to vacate or modify the preliminary injunction. These facts support a reasonable inference that defendants knew the preliminary injunction had not been vacated when Quinnan received the first $50,000. In any event, whether the first $50,000 transfer was or was not in violation of the preliminary injunction is ultimately irrelevant to our disposition, as the allegations of the second amended complaint are sufficient to withstand defendants' demurrer regardless.

B. The Anti-SLAPP Statute

The Legislature enacted Code of Civil Procedure section 425.16 to prevent the chilling effect of meritless lawsuits that force an individual into litigation for exercising his or her right of petition or free speech. "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).) The statute's purpose is to "weed[] out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

Evaluation of an anti-SLAPP motion involves a two-step process. First, the defendant must make " ' "a threshold showing that the challenged cause of action is one 'arising from' protected activity." ' " (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.) If the defendant succeeds, the burden shifts to the plaintiff to " ' "demonstrate[] a probability of prevailing on the claim." ' " (*Ibid*.) At the second step, the court " ' " 'accept[s] as true the evidence favorable to the plaintiff [citation] and evaluate[s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' " ' " (*Ibid*.) "An anti-SLAPP motion must be denied ' "if the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff. [Citation.]" ' " (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1421.)

We review the trial court's denial of an anti-SLAPP motion de novo following this two-step process. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–326.)

C. Plaintiff's UFTA Claim Does Not Arise from Protected Activity

The mode of proceeding at the often-elusive first prong of the anti-SLAPP inquiry has been worked out in some detail. (*Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 594.) To ascertain whether a claim arises from protected conduct, "the court shall consider the pleadings, and supporting and opposing affidavits

stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).) We disregard a cause of action's label and instead examine whether the cause of action is based on the defendant's protected free speech or petitioning activity. (See *Navellier v. Sletten* (2002) 29 Cal.4th 82, 91–95.)

As our Supreme Court clarified in *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 (*Park*), "[a] claim arises from protected activity when that activity underlies or forms the basis for the claim." The only means by which a moving defendant can satisfy "the ['arising from'] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e)." (*Id.* at p. 1063, italics in original.) "[C]ourts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Ibid.*)

Written or oral statements or writings made in litigation or in connection with an issue under review in litigation are protected. (Code Civ. Proc., § 425.16, subds. (e)(1), (2).) However, it is well settled that not all litigation-related conduct is protected. (See, e.g., *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 189–194 [court reporter's lawsuit to recover fees incurred in litigation targeted the nonpayment of invoices, not protected activity]; *Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2016) 230 Cal.App.4th 859, 869 [causes of action based on law firm's alleged wrongful withdrawal of settlement proceeds from trust account following settlement did not constitute protected activity]; *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036–1037 [in lawsuit seeking payment of medical liens, attorney's disbursement of settlement proceeds was not protected activity].) Courts must respect the distinction between protected "activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1064.)

To support his anti-SLAPP motion, Quinnan submitted a declaration stating he accepted $50,000 as a flat fee to perform legal services for Lee, and he argues that his acts of defending Lee and his acceptance of payment for legal services constitute

protected litigation conduct.[6] Plaintiff counters that his complaint does not arise from Quinnan's acts of representing Lee, and the acceptance of unlawful monetary transfers is not protected conduct. We find that Quinnan has not satisfied his burden of showing that plaintiff's claim arises from protected conduct.

Plaintiff's UFTA claim alleges that Quinnan accepted an unreasonable transfer of $50,000 with intent to defraud. Plaintiff does not sue Quinnan for the acts he engaged in during his defense of Lee; thus, Quinnan cannot establish that the acts he performed in providing legal services are themselves "the wrong complained of" (*Park, supra*, 2 Cal.5th at p. 1060) or that they supply "the elements of the challenged claim." (*Id.* at p. 1060). Further, although the act causing plaintiff's purported harm may be related to litigation, because Quinnan accepted the transfer as payment for his services, acceptance of payment for services does not constitute "a written or oral statement or writing" made in litigation or in connection with an issue under review in litigation. (See Code Civ. Proc., § 425.16, subds. (e)(1), (2).) Even if Quinnan would not have accepted payment but for performance of litigation services, that does not establish that plaintiff's claim is based on Quinnan's protected activity in performing those services. As such, the injury-producing conduct is not protected.

Nor do the cases Quinnan cites provide authority for his argument that acceptance of money, even as payment for legal services, constitutes protected activity. In *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 411, the actions giving rise to liability were the attorney's conduct of giving advice to his client regarding threatened litigation and writing a letter to opposing counsel. Similarly, in *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 811, the acts giving rise to liability were all litigation acts, such as devising and carrying out legal strategy for litigation, instituting

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[6] We do not address the argument that Quinnan's conduct furthered the exercise of a constitutional right to free speech in connection with a public issue or issue of public interest under section 425.16 subdivision (e)(4) because he twice forfeited this argument by not raising it below or in his opening brief. (See *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1135.)

litigation, and drafting and exchanging pleadings. Again, plaintiff does not sue Quinnan for the litigation acts he engaged in during his defense of Lee.

In *Flores v. Emerich & Fike* (E.D. Cal. 2006) 416 F.Supp.2d 885, 907–908, also cited by Quinnan, the court considered whether a law firm's acts of defending a lawsuit, filing a counter-claim, taking various steps in litigation, and accepting payment for services rendered constituted protected activity. The court's one-sentence analysis on this issue states, "[t]he alleged acts are all related to the [the attorney defendants'] right to petition the courts to represent clients as attorneys and are therefore covered by the Anti-SLAPP statute." (*Id.* at p. 908.) We find *Flores* unpersuasive on the question of whether an attorney's acceptance of payment for legal services alone constitutes protected activity, because the court cited no authority and offered no analysis to support its conclusion. Further, *Flores* was decided before *Park, supra*, 2 Cal.5th at pp. 1062–1063, wherein the Supreme Court made clear that the relevant question under the first prong of the anti-SLAPP test is whether protected conduct itself gave rise to a plaintiff's injury, not whether the plaintiff's claim is related to protected conduct.

Our holding that plaintiff's UFTA claim does not arise from protected conduct should not be understood to determine that the claim has merit or that Quinnan lacks other remedies if the claim is frivolous. (See, e.g., *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, fn. 4.) These are not considerations pertinent to the first prong of the anti-SLAPP analysis, and we do not address plaintiff's probability of prevailing.

DISPOSITION

The trial court's orders overruling defendants' demurrer and denying the anti-SLAPP motion are affirmed.

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Brown, J.

We concur:

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Pollak, P.J.

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Streeter, J.